No. ~~970~~ 8

IN THE

Supreme Court of the United States

October Term 1955

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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Appellants, the Railway Labor Executives' Association, et al., appeal from the judgment of the United States District Court for the District of Columbia, entered on January 27, 1956, affirming orders of the Interstate Commerce Commission, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the District of Columbia has not been reported. The opinion of the District Court is attached hereto as Appendix B, and the judgment of said Court is attached as Appendix C. The opinion of the Interstate Commerce Commission is reported at 63 M.C.C. 91. The orders of the Commission are unreported. The Commission's opinion and orders are attached as Appendix D.

JURISDICTION

This suit was brought under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) and Sections 1336, 1398, 2284 and 2321-2325 of the Judicial Code (28 U.S.C. 1336, 1398, 2284, 2321-2325), and Section 205(g) of the Interstate Commerce Act (49 U.S.C. 305(g) to enjoin, annul, and set aside orders of the Interstate Commerce Commission dated November 22, 1954, July 6, 1955, and September 9, 1955, entered in Commission Docket No. MC-29130 (Sub-No. 70). The judgment of the District Court was entered on January 27, 1956, and notice of appeal was filed in that court on March 26, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code (28 U.S.C. 1253 and 2101(b)). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Capital Transit Company*, 325 U.S. 357 (1945); *United States* v. *Detroit and Cleveland Navigation Company*, 326 U.S. 236 (1945); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

QUESTIONS PRESENTED

1. Where the Interstate Commerce Commission has approved the acquisition of independent motor carriers and their operating rights by a wholly-owned subsidiary of a railroad subject to restrictions on the operating rights thus acquired limiting the operations of the railroad subsidiary thereunder to services which are auxiliary to or supplemental of the railroad's train service in accordance with the requirements of the former Section 213 and present Section 5(2)(b) of the Interstate Commerce Act, does the Interstate Commerce Commission have authority thereafter to remove those restrictions without regard to the requirements of such sections of the statute and authorize the railroad subsidiary to operate an unrestricted motor carrier service over the same routes through the guise of a certificate proceeding under Section 207(a) of that Act.?

2. Whether, in any event, the Interstate Commerce Commission, in authorizing the performance of motor carrier service by a railroad subsidiary, pursuant to either Section 5(2)(b) of the Interstate Commerce Act or Section 207(a) of such Act, is required by the provisions of the Interstate Commerce Act and the National Transportation Policy to limit such motor service to that which is auxiliary to or supplemental of the rail service of the parent railroad?

STATUTES INVOLVED

This appeal involves the National Transportation Policy (49 U.S.C., preceding Section 1), Sections 5(2)(a) and (b), 206, 207(a), 208(a), and former Section 213(a)(1) of the Interstate Commerce Act, as amended (49 U.S.C. 5(2)(a) and (b) and 306,

307(a)(1), 308(a), and 313(a)(1)). These statutory provisions are set forth in Appendix A hereto.

STATEMENT

The orders of the Interstate Commerce Commission, which are the subject of this litigation, granted to the Rock Island Motor Transit Company (hereafter called "Motor Transit"), a wholly-owned subsidiary of the Chicago, Rock Island, and Pacific Railroad (hereafter called "Rock Island Railroad"), an authorization to transport general commodities, with certain exceptions, between various points in Illinois, Iowa, and Nebraska.[1] The grant contained no restrictions limiting the trucking operations of Motor Transit to those which were auxiliary to or supplemental of the parent railroad's train services.[2]

The interest of the appellants in this Commission action stemmed out of their representation of employees of the nation's railroads. The appellant Rail-

[1] The routes granted were between Silvis, Ill., and Omaha, Nebr., over Illinois Highway 92 and U. S. Highway 6, via various intermediate points; between Iowa City, Iowa, and Cedar Rapids, Iowa, over U. S. Highway 218; between Harlan, Iowa, and Omaha, Nebr., over Iowa Highway 64 and U. S. Highway 6, via various intermediate points; and between Avoca, Iowa, and Atlantic, Iowa, over U. S. Highways 59 and 6 and Iowa Highway 83.

[2] The Commission's orders made the grant subject to the following general conditions: (1) that there may be attached from time to time to the privileges granted such reasonable terms, conditions, and limitations as the public convenience and necessity may require, and (2) that all contractual arrangements between The Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railroad Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

way Labor Executives' Association is composed of twenty affiliate standard national and international railway labor organizations which are the duly certified representatives under the Railway Labor Act (45 U.S.C. 151, et seq.) of various categories of employees of the country's principal railroads, including the Rock Island Railroad. These organizations are:

American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood Railway Carmen of America
Brotherhood of Railroad Signalmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Railroad Trainmen
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employees and Bartenders International Union
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Organization Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
The Order of Railroad Telegraphers
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Switchmen's Union of North America

The organizations affiliated with the appellant Association have agreements with the Rock Island Railroad concerning rates of pay, rules and working conditions

of such employees which confer valuable property rights upon the employees. In their representation of rail employees, these organizations have participated in numerous Commission proceedings for the purpose of urging full implementation of the National Transportation Policy, declared by Congress to preserve the independent status and the inherent advantages of each mode of transportation (49 U.S.C., preceding Section 1). They have not opposed the acquisition of trucking operations by railroads or the expansion of railroad-owned trucking carriers. However, they have endeavored to keep such railroad controlled trucking operations auxiliary to or supplemental of the rail service of the parent railroads consistent with the requirements of the Interstate Commerce Act. Their interest in opposing unrestricted motor trucking operations by railroads or railroad subsidiaries is to preserve the job security of rail employees. Such security lies in the railroads waging a strong competitive fight to retain rail service. The abandonment of rail service by railroads in favor of trucking operations constitutes a threat to this job security. The appellants therefore intervened in the proceeding before the Commission and argued that the Interstate Commerce Act required the agency to restrict Motor Transit's operations involved in the application to those which were auxiliary to or supplemental of its parent railroads train services.

The routes which were certificated to Motor Transit on an unrestricted basis in the Commission orders here involved were already certificated to that carrier subject to restrictions designed to ensure that operations thereunder be auxiliary to or supplemental of the Rock Island Railroad's train service. Such prior

certificate was issued after lengthy proceedings before the Commission on applications by Motor Transit for agency approval of its purchase of the routes from existing independent operators as follows:

(1) The route between Omaha, Nebraska, and Silvis, Illinois, over U. S. Highway No. 6 and Illinois Highway No. 92 was purchased by Motor Transit from the White Line Motor Freight Company in 1937.[3] In *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 5 M.C.C. 451 (1938), the Commission approved the purchase pursuant to Section 213(A)(1) of the Interstate Commerce Act, which required the agency to find, *inter alia*, that the transaction would promote the public interest by enabling the Rock Island Railroad to use the acquired motor service of its subsidiary to public advantage in the railroad's own operations. The Commission made the necessary statutory finding upon the basis of the representations of Motor Transit of its intention to operate a coordinated rail-motor service and thereby to improve the parent railroad's service to the public (p. 455). The Commission found that Motor Transit's proposal was similar to that approved in *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M.C.C. 101 (1936), 5 M.C.C. 9, 49 (1937), and referred to the fact that it had there outlined the scope of approved and disapproved motor carrier operations by a railroad or its subsidiary (p. 454). In such earlier case the Commission had stated (5 M.C.C. 11, 12) that "approved operations are those which are

[3] The vendor at the time of the acquisition was in process of perfecting the operating rights it sold to Motor Transit under Section 206(a) of the Interstate Commerce Act (49 U.S.C. 306(a)).

auxiliary or supplemental to train service." In addition, the Commission required Motor Transit to abandon parts of the White Line purchase not along the line of the Rock Island Railroad and imposed as specific conditions on its approval (a) that Motor Transit should not render service from or to, or interchange traffic at, any point other than a station on the line of the parent railroad, and (b) that the operating authority acquired was subject to such further limitations, restrictions, or modifications as the Commission might find necessary to impose or make in order to ensure that the motor trucking operation be auxiliary to or supplemental of the parent railroad's train service and not unduly restrain competition.

Subsequently, the Commission on its own motion reopened the proceeding and in *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457 (1946) imposed additional restrictions on the operating rights acquired by Motor Transit from the White Line to ensure that Motor Transit's operations thereunder be auxiliary to or supplemental of the parent railroad's train service.[1] In *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 55 M.C.C. 567

[1] The conditions thus imposed were:

1. The service to be performed by the Rock Island Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railway Company.

2. The Rock Island Motor Transit Company shall not render any service to, or from or interchange traffic at any point not a station on the rail line of The Chicago, Rock Island and Pacific Railway Company.

3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebraska, Des Moines, Iowa, and collectively Davenport and

(1949), the Commission reaffirmed the additional conditions and thereafter this Court sustained the validity of the Commission's action. *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951).

(2) The routes between Harlan, Iowa, and Omaha, Nebraska, over Iowa Highway 64 and U. S. Highway 6 between Avoca, Iowa, and Atlantic, Iowa, over U. S. Highways 59 and 6, and return over Iowa Highway 93 were purchased by Motor Transit from Messrs. D. H. Frederickson and J. H. Frederickson in 1944. In *Rock Island Motor Transit—Purchase—Frederickson*, 39 M.C.C. 824 (1944), the Commission approved this purchase under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)). As a condition of such approval Section 5(2)(b) required the Commission to make the same findings previously required by Section 213(a)(1) that the transaction would enable the parent Rock Island Railroad to use the trucking rights thus purchased to public advantage in the railroad's own operations.[5] The Commission in its original order did

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Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Illinois.

4. All contractual arrangements between The Rock Island Motor Transit Company and The Chicago, Rock Island and Pacific Railway Company shall be reported and shall be subject to revision, if and as it is found to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as the Commission in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

[5] Section 213 was repealed by the Transportation Act of 1940 (54 Stat. 924, Section 21(e)), and its substance carried forward into Section 5(2)(b) of the Interstate Commerce Act. There is a slight difference in wording in the proviso as found in Section 213(a)(1) and Section 5(2)(b). The Commission has held, however, that this difference is of no significance. *Scott Bros., Inc.—Central—W. G. Corp.*, 37 M.C.C. 225 (1941).

not impose any specific restrictions to effectuate this statutory requirement, but prior to the issuance of a certificate for the Frederickson Line rights, the agency reopened the proceeding as a part of its reconsideration of the White Line purchase, *supra*, p. 8, and in such reconsidered proceeding imposed the conditions enumerated above upon the Frederickson rights as well as the White Line rights. This Court also upheld the validity of the Frederickson conditions in *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951).

On September 11, 1951, following this Court's decision, the Commission issued Motor Transit a certificate covering the White Line and Frederickson Line purchases which contained the enumerated restrictions limiting Motor Transit's authority thereunder to operations auxiliary to or supplemental of its parent railroad's train service. Almost immediately thereafter Motor Transit on October 21, 1951, filed with the Commission an application purportedly under Section 207(a) of the Interstate Commerce Act for the grant of unrestricted operating rights over the identical routes it had acquired in purchase proceedings as set forth above.[9]

In orders dated November 22, 1954, reaffirmed on July 6, 1955, and September 9, 1955, the Commission granted Motor Transit's application. The agency re-

[9] During the pendency of this application Motor Transit obtained from the Commission temporary authority to operate over the routes involved without the restrictions which the agency had imposed, subject to a maximum weight limitation and to the further "keypoint" restriction that no shipment could be transported between Chicago and Omaha, or through, or to, or from, more than one of the points of Omaha and, collectively, Davenport, Bettendorf, Rock Island, Moline and East Moline.

fused to consider the evidence before it in the light of the limitations imposed by Section 5(2)(b) of the Interstate Commerce Act or to make the findings required by that Section that the parent railroad is able to use the operations involved to public advantage in its rail service. This refusal was based on the ground that Motor Transit's application was subject only to Sections 207 and 208 of the Interstate Commerce Act, which do not specifically contain the limitations of Section 5(2)(b), so that the application of the standards of the latter section of the statute in passing upon Motor Transit's application was a matter wholly committed to the agency's discretion, and that in the exercise of such discretion the Commission believed the public interest required the omission of the limitations.

Thereafter, the American Trucking Association, et al., filed a complaint in the District Court on June 19, 1956, asking for a permanent injunction against the effectiveness of the Commission's orders. The appellants filed motions to intervene in the case as parties plaintiffs and asked for permission to file complaints requesting that the Commission's orders be set aside and enjoined.[7] These motions, were not opposed, were granted by orders of the District Court entered on October 24, 1955, and the complaints of the intervening plaintiffs were filed the same day.

The appellants argued to the District Court, as they had to the Commission, that the agency as a matter of

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[7] Intervenors included two railway labor organizations not then affiliated with the appellant, Railway Labor Executives' Association. These organizations were the Brotherhood of Railroad Trainmen and the Order of Railway Conductors & Brakemen. On January 1, 1956, these two organizations became affiliated with the appellant Association.

law was required to measure the application of Motor Transit by the standards of Section 5(2)(b) of the Interstate Commerce Act. The District Court rejected this contention on the ground that the case involved only the issuance of a certificate and that the statutory requirements under which auxiliary and supplemental service limitations are imposed do not appear in Section 207(a) of the Act governing the issuance of certificates (Appendix B, p. 12a). The Court therefore affirmed the Commission's orders against the complaints of the appellants and granted judgment to the Commission and the United States.

The District Court gave no consideration to the fact that the application of Motor Transit was in substance a request to remove restrictions from a certificate issued to it pursuant to Section 5(2)(b) of the Interstate Commerce Act. Nor does its opinion reflect any consideration of the Commission's long-established practice of treating applications under Section 207(a) involving railroads or railroad subsidiaries as governed by the same basic considerations as applications by such parties under Section 5(2)(b).

The original plaintiffs, the American Trucking Association, et al., docketed their appeal from this judgment of the District Court on May 22, 1956, case No. 961.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of importance to the railroad industry and its employees and to the administration of the Interstate Commerce Act. The National Transportation Policy (49 U.S.C., preceding Section 1) declares it to be the policy of Congress to provide for regulation of all modes of transportation

subject to the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each, to the end of developing, coordinating and preserving a national transportation system by water, highway and rail adequate to meet the needs of the commerce of the United States, of postal service, and of the national defense. This statement of policy also provides that all provisions of the Interstate Commerce Act are to be administered and enforced with a view to carrying out such declaration of policy.

One of the most important provisions in the statute for preserving the independence and inherent advantages of each mode of transportation is the proviso contained in Section 5(2)(b)[8] (and in former Section 213(a)(1)) which requires that in any case where a railroad or a subsidiary of a railroad is an applicant before the Commission for approval of a purchase or acquisition of a motor carrier, the Commission may not grant such approval "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

The Court below found that in practical application this requirement means that the proposed service by motor vehicle must be auxiliary to or supplemental of the rail service of the railroad involved.[9] The enforce-

[8] 49 U.S.C. 5(2)(b).

[9] Such has been the application of the proviso of former Section 213(a)(1) and of present Section 5(2)(b) of the Interstate Commerce Act by the Commission. See *Pennsylvania Truck Lines, Inc. —Control—Barker*, 1 M.C.C. 101 (1936); *Northland-Greyhound Lines, Inc.—Purchase—Liederback*, 5 M.C.C. 215, 216 (1937); *Niagara Frt. Lines—Purchase—Westlake & Albertson*,

ment of such statutory requirement is important to the employees of the railroads in behalf of whom the present appeal is taken because any deviation therefrom must inevitably result in the weakening of rail carrier competition with trucking operations and in the abandonment of rail service to the detriment of the job security and the interest of all rail employees, including those of the Rock Island Railroad. In this case the Commission, without measuring the application of Motor Transit or the evidence submitted in support thereof against the cited statutory requirement of Section 5(2)(b), removed the restrictions on Motor Transit's certificate which the Commission had previously found were required by that section. It did so on the theory that Section 5(2)(b) was not applicable because the case before it was a certificate case and not an acquisition case, in spite of the fact that there was outstanding a certificate issued under the acquisition sections of the statute covering the identical routes. The judgment of the District Court affirming the Commission's action is, we believe, in direct conflict with the statutory requirements and can only result in the complete destruction of Section 5(2)(b) and of the National Transportation Policy embodied therein. Such judgment, if not reversed,

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5 M.C.C. 535, 537 (1938); *Southwestern Transportation Co.—Purchase—Hill & Howe*, 37 M.C.C. 83, 89 (1941). A trucking operation which is auxiliary to or supplemental of a rail operation is ordinarily one in which shipments move at rail rates and on rail bills of lading, and which must be connected with the rail service. *Texas & Pacific M. Transport Co. Com. Car. App.*, 47 M.C.C. 721 (1943). The Commission from time to time has varied the precise conditions which it believes necessary in a given case to ensure an auxiliary or supplemental operation. However, it has continually, until the present case kept rail-owned motor carriers within the basic concept. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 542 (1951).

also can have equally adverse effects upon the administration of the Civil Aeronautics Act.

1. This case involves the unique and almost unheard of feature of an applicant seeking a certificate to operate over routes already certificated to it by the same agency. It is doubtful whether the Interstate Commerce Commission or any other agency concerned with granting authorizations to engage in transportation has heretofore been confronted with such an application. Ordinarily, such application would be dismissed as a sheer waste of the administrative agency's time. However, in this case the Commission processed the application just as if it were a bona fide new route application and as if Motor Transit had no connection at all with the routes involved. However, it is clear from the facts that although the application was in form one for the grant of a new certificate under Section 207(a), its substance was a request to remove the restrictions previously imposed to make Motor Transit's operations auxiliary to or supplemental of the rail service of its parent, the Rock Island Railroad. This obvious purpose is stated in the findings of the Examiner as follows:

> "The restrictions and conditions set forth above were imposed on the certificate and authorities previously issued or granted, and as a result thereof applicant filed the captioned application for authority under section 207(a) of the Act seeking the identical authority it possessed prior to September 11, 1951, when the restrictions and conditions were imposed. The purpose of this application is to obtain operating authority not subject to restrictions or conditions that prevent applicant from operating as a motor carrier having no affiliation with a railroad.".

Since Motor Transit's clear purpose was not the grant of a route, but the removal of restrictions on its certificate for an existing route, it should have filed an application asking for modification of the conditions. Had it done so, no one would seriously contend that the Commission could have modified or removed the restrictions at its discretion without measuring the evidence adduced against the standards of Section 5(2)(b) and without making the findings which that Section requires.[10] Motor Transit sought to avoid that

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[10] The Commission clearly recognized its lack of discretion in applying the standards of Section 5(2)(b) to routes acquired by purchase in *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit*, 57 M.C.C. 4 (1950), in which it declared (pp. 49 and 52):

> "Applicants further contend that, assuming applicants are affiliated with the railway, it is not necessary that we find that the motor-vehicle service of the carriers of which control would be acquired would be used to public advantage by the railway in its operations, because the literal requirements of the proviso of section 5(2)(b) can be relaxed in order to carry out the declared national transportation policy. * * *
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> "Apparently applicants concede that they are unable to submit evidence sufficient to meet the proof requirements of the proviso of section 5(2)(b), the application contains no such evidence, and it is not apparent to us how those requirements can be met in view of the location of the railway, the nature of the service which it renders, and the location of the motor bus carriers which the partnership would indirectly control. We do not agree with the position of applicants that we are empowered to relax the specific requirements of the statute and find that this transaction would be consistent with the public interest, without also finding that the railroad would be enabled to use service by motor vehicle to public advantage in its operations. As stated in E. T. & W. N. C. M. Transportation Co.—Lease—Imperial Transp. Co., Inc., 5 M.C.C. 196: 'Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation.'"

result by filing a certificate application purportedly under Section 207, and the Commission sanctioned this obvious evasion of the statute by erroneously treating the application as if it were a bona fide certificate application under such section completely unrelated to the prior acquisition cases and which raised only issues with respect to the public convenience and necessity.

If the Commission may validly do what it has done in this case, the proviso in Section 5(2)(b) becomes meaningless. A substantial portion of all trucking operations now performed in this country by railroads or their subsidiaries are performed over routes acquired subject to the restrictions of Section 5(2)(b) or of its predecessor Section 213, which limit those motor carrier services to those which are auxiliary or supplemental to the rail services of the railroad involved. Under the Commission's decision, every railroad in the country which has such an operation may now come in and apply to the Commission for a certificate under Section 207 authorizing it to operate over the same routes without the restrictions imposed by the acquisition provisions of the statute, and the Commission has complete discretion to grant the request without measuring it by the standards of Section 5. Indeed, if the Commission has correctly interpreted the statute, railroads may buy out independent motor carriers, accept the restrictions required by Section 5(2)(b), file an application under Section 207 for the same routes without the restrictions before the ink is dry on the certificate, and within a matter of a few months have their application granted.

Even assuming, *arguendo*, the correctness of the Commission's interpretation of Section 207(a) of the

Interstate Commerce Act in an appropriate case involving a new route application, we believe that the Commission's action here results in a clear evasion of the statute and represents a complete sacrifice of form for substance. This Court in *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947) made clear that statutory requirements cannot be evaded by mere words and labels and that it is against the substance of Commission action that the validity of its orders must be measured.

In closely similar circumstances another federal agency, the Civil Aeronautics Board, characterized a like request for precisely what it was—a suggestion to the agency to read the applicable statutory requirements out of the act. In enacting the Civil Aeronautics Act of 1938, Congress showed the same concern for the preservation of the independence of air transportation from the control of service transportation as it has in maintaining the independence and inherent advantages of rail and motor carrier operations. It therefore placed in Section 408(b) of the Civil Aeronautics Act [49 U.S.C. 488(b)] the identical restrictions found in Section 5(2)(b) of the Interstate Commerce Act so that any surface carrier or a subsidiary thereof which wishes to acquire an air carrier can do so only if the Civil Aeronautics Board, the administering agency, finds that the transaction proposed "will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition." The Board has applied this restriction in the same manner as has the Interstate Commerce Commission in acquisition cases before it, i.e., it has required a showing that the air carrier operations will

be auxiliary to or supplemental of the applicant surface carrier's operations.[11] In the *Parks Investigation Case*, 11 C.A.B. 779 (1950), the Board had before it a wholly-owned subsidiary of a transcontinental bus company as an applicant for a certificate of public convenience and necessity to operate as an air carrier. The Board held that the relationship of the applicant to the transcontinental bus system would have to be acted upon by the Board under Section 408 of the Civil Aeronautics Act in the event the subsidiary should be granted a certificate. The parent bus company and the subsidiary then filed an application with the Board for approval of the transfer to the parent of any certificate which might be issued to the subsidiary in the proceeding. The application was predicated upon the assumption that the Board could transfer the certificate under Section 401(i) of the Civil Aeronautics Act [49 U.S.C. 481(i)] merely on findings of the public interest and that there would then be no necessity for an approval under Section 408 with its strict requirements like those of Section 5(2)(b) of the Interstate Commerce Act. The Board, in refusing to sanction this attempted evasion of the statute, stated (pp. 788, 789):

> "Basically what the applicants are thus asking us to do is to read section 408 out of the Act through the device of a transfer under section 401(i). In so doing they presume that the requirements of section 408, as applied to this case, are merely technical in nature, and that they may be avoided by another technicality. However, such an approach misconstrues the real nature of the problem confronting us in this proceeding. That

[11] *American Export Airlines, Inc.—American Export Lines Control—American Export Airlines*, 3 C.A.B. 619 (1942).

problem arises out of a clear statutory directive to restrict control of an air carrier by a surface carrier to those instances where the test of the second proviso of section 408 can be met. The courts have applied such directive to the type of situation before us. This mandate is not a mere legal technicality. It represents a substantive declaration of policy which it is our statutory obligation to enforce. We do not believe that it would be consistent with the public interest for us to attempt to avoid this obligation through the device of a transfer under section 401(i) of the Act, which does not eliminate the relationship which Congress intended to restrict. On this ground alone we would not entertain such a proposal."

This action of the Board came before the United States Court of Appeals for the District of Columbia Circuit in *Continental Southern Lines* v. *Civil Aeronautics*, 197 F. 2d 397, 403 (1952), cert. den. 344 U.S. 831, and was sustained by that Court. On this point the Court declared:

"... *Even if the necessity for actual proceedings under § 408 could be avoided by the device suggested, a result we seriously question*, the transfer could not be approved unless the Board thought it in the public interest. And the concept of 'public interest' for the purposes of a transfer is just as broad as 'public interest' on an original certification proceeding. In both cases, it includes the policies and standards of § 408(b)...." (Emphasis supplied.)

If the judgment of the court below is sustained, then not only have the Commission and the railroads effectively read Section 5(2)(b) out of the Interstate Commerce Act, but also the door has been opened wide to a similar destruction of the requirements of Section 408(b) of the Civil Aeronautics Act.

2. The Commission's determination that the ability of a railroad subsidiary to meet the restrictive standards of the proviso in Section 5(2)(b) is not a necessary requirement in the adjudication of an application of such subsidiary for a certificate of public convenience and necessity to operate as a motor carrier under Section 207(a) is contrary to the expressed policy of the statute and the Commission's past application of that policy.

The National Transportation Policy [49 U.S.C., preceding section 1] requires, *inter alia*, the recognition and preservation of the inherent advantages of each mode of transportation covered by the Interstate Commerce Act. The Commission has found that the achievement of this policy as applied to motor carrier operations by railroads and railroad subsidiaries requires the restriction of such operations to those which are auxiliary to or supplemental of the rail service of the railroad involved. *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101 (1936), 5 M.C.C. 9 (1937); *Kansas City Southern Transport Company, Inc.—Com. Car. App.*, 10 M.C.C. 21 (1938). In the present case the Commission takes the position that it need not apply this Congressional purpose because Section 207(a) does not contain the specific implementation which is found in the proviso of Section 5(2)(b). However, Congress did not so limit its purpose. The last sentence of the National Transportation Policy states that, "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." The effect of this language is to require the Commission to carry out the congressional purpose to the same extent in the administration of Section 207(a) as it does

in the administration of Section 5(2)(b). Congress has written limitations into Section 207(a) upon railroad entry into motor carrier service just as plainly and clearly as if it had inserted into that section the actual words appearing in Section 5(2)(b).

The requirement of a uniform administration of the certificate and acquisition provisions of the Interstate Commerce Act and a correlation of the two has been recognized by the Commission and by the courts. In *Associated Transport, Inc.—Purchase—Russell*, 55 M.C.C. 177 (1948), the Commission declared (p. 183):

> "Although the facts dealt with are dissimilar, the same National Transportation Policy applies and the same basic considerations govern, in the disposition of applications under section 5 and section 207 of the Act."

To the same effect is the statement of this Court in *Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U.S. 373, 376, 377 (1942), that the Commission must carry out the purposes of the statute in applying the phrase "public convenience and necessity" to the same extent that it does in acting under Section 5.

The Commission has strengthened this construction of the statute by its long and consistent uniform application of the auxiliary or supplemental restrictions to cases both under Section 5 and Section 207. In the earlier case involving Motor Transit, *Rock Island Motor Transit Company—Purchase—White Line M. Frt.*, 40 M.C.C. 457 (1946), the Commission reviewed its past application in Section 207 proceedings of the requirements of Section 213. (Pages 461 and 462.) It concluded (page 468) that Congress in re-enacting

Section 213 into Section 5(2) in 1940 had given its approval of this established administrative practice. Finally, the Commission categorically stated that the requirements of the National Transportation Policy required the same treatment for railroad or railroad controlled applicants in Section 207 cases as in Section 5 cases (page 471):

> "From a regulatory standpoint motor-carrier operations conducted by a railroad affiliate should be the same whether the authority under which they are conducted was acquired by an application under Section 207 or by purchase . . . ."

Such Commission application of the requirements of Section 5(2)(b) in Section 207 proceedings has been recognized by this Court in both *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 450 (1951), and in *United States* v. *Texas and Pacific Motor Transport Co.*, 340 U.S. 450, 459 (1951).

The Commission's practice also received the sanction of this Court in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945), which involved an application under Section 207 for extension of motor carrier operating rights by a wholly owned subsidiary of the Pennsylvania Railroad Company. This Court upheld the Commission's action in granting a certificate which was restricted to services truly supplementary or auxiliary to the operations of the parent railroad. The Court reviewed the legislative history of the Motor Carrier Act of 1935 and concluded that railroads may operate trucks "in appropriate places." (pp. 66, 67.) The Court then went on to uphold the validity of the grant of a certificate to the railroad subsidiary and, in so doing, repeatedly emphasized the

limited nature of the certificate and the coordinated rail-motor service provided.

It is submitted that the decision of the District Court fails to recognize the real substance of the Commission's action and permits a complete circumvention of the statutory requirements. It further fails to give proper recognition to the Commission's long-established construction of the statute and to Congressional approval thereof upon which the Commission itself relied as a basis for continuation of such construction. We believe that the questions presented by this appeal are substantial and that they are of public importance.

CONCLUSION

For the foregoing reasons, jurisdiction should be noted and the judgment of the District Court reversed.

Respectfully submitted,

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May 24, 1956.

APPENDIX A

STATUTES INVOLVED

Administrative Procedure Act (5 U. S. C. A. 1000 et seq.)

Section 10. (a):

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Judicial Code (28 U. S. C. A. 1 et seq.)

§ 1336. *Interstate Commerce Commission's orders*

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. June 25, 1948, c. 646, 62 Stat. 931."

§ 1398. *Interstate Commerce Commission's orders*

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action. June 25, 1948, c. 646, 62 Stat. 936.

§ 2284(1). *Three-judge district court; composition; procedure*

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the competition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit,

who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

§ 2323. *Duties of Attorney General; intervenors*

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. As amended May 24, 1949, c. 139, § 116, 63 Stat. 105.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party:

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. June 25, 1948, c. 646, 62 Stat. 970, amended May 24, 1949, c. 139, § 116, 63 Stat. 105.

§ 2325. *Injunction; three-judge court required*

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in

part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 970.

§ 1253. *Direct appeals from decisions of three-judge courts.*

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926.

§ 2101. *Supreme Court; time for appeal or certiorari; docketing; stay*

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

National Transportation Act of 1940 (49 U. S. C. 1 et seq.)

NATIONAL TRANSPORTATION POLICY (49 U. S. C., preceding sections 1, 301, 901 and 1001)

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue prefer-

ences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

INTERSTATE COMMERCE ACT (49 U. S. C. 1 *et seq.*)

Section 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

Section 5 (2) (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person

seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: PROVIDED, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Section 205 (g) (49 U. S. C. Section 305 (g)) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I: *Provided*, That, where the Commission, in respect of any matter arising under this part, shall have

issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

Application for Certificate of Public Convenience and Necessity

Sec. 206 (August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.) (49 U.S.C. Sec. 306.) (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days

after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

Section 207. [*August 9, 1935*] [49 U. S. C., § 307.] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except

as such carrier may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Section 208. [*August 9, 1935.*] [49 U. S. C., § 308.] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may

transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

(d) A certificate for the transportation of passengers may include authority to transport in the same vehicle with the passengers, newspapers, baggage of passengers, express, or mail, or to transport baggage of passengers in a separate vehicle.

Section 213 (a) (1) [49 U. S. C. Section 313 (a)(1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205 (f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however*, That if a carrier as defined in section 1(3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unles it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3171-55

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*.

MEMORANDUM OPINION

Before Prettyman, Circuit Judge, and Pine and Holtzoff, District Judges, sitting as a statutory three-judge court.

PRETTYMAN, *Circuit Judge:* The Chicago, Rock Island and Pacific Railroad Company is a through trunk-line railroad operating, so far as is here pertinent, across the State of Iowa from Davenport to Council Bluffs. It owns a subsidiary, called herein "Motor Transit", which owns operating rights and property as a motor carrier on routes paralleling or stemming from the Railroad route. The motor carrier certificates have heretofore contained limitations requiring that the motor service be auxiliary or supplementary to the rail service, but those limitations were stayed and have never been enforced. The motor carrier applied for a certificate without the restrictions. The application was opposed by other motor carriers. After extensive proceedings the Interstate Commerce Commission granted the application, subject to the conditions that there might be attached such reasonable terms, conditions, and limitations as the public convenience and necessity might require and that all contractual arrangements with the Railroad should be reported to the Commission and be subject to its revision. Petition for reconsideration having been denied, this action to set aside the order was brought by motor carriers operating in the same general area as Motor Transit.

The pub of the controversy is in two parts, (1) whether the Commission has power to grant a certificate to a motor carrier wholly owned by a railroad without a restriction that the service shall be auxiliary or supplementary to the railroad service and (2), if so, whether the findings of the Commission to the effect that the public convenience and necessity justified the grant in the present case were supported by evidence in the record.

Two sections of the Interstate Commerce Act, as now amended, are involved. Section 5(2)(b)[1] provides that, whenever a carrier by railroad, or its subsidiary, is an applicant for approval of a transaction involving a motor carrier, the Commission shall not approve unless it finds, *inter alia*, that the transaction will enable the carrier to use service by motor vehicle to public advantage in its operations. This section governs the acquisition of motor carriers by railroads. Section 207(a) of the Act[2] provides that a certificate shall be issued to any qualified applicant therefor if it is found, *inter alia*, that the proposed service is or will be required by the present or future public convenience and necessity. This latter section (207(a)) does not contain the requirement which appears in the former section (5(2)(b)) that the proposed service must be used in the operation of the railroad if a railroad is the applicant. It is agreed that the requirement that the service be used in the operation of the railroad applicant means that the service must be auxiliary or supplementary to the rail service.

Plaintiffs say that the requirement which appears in Section 5(2)(b) must be read into Section 207(a) and therefore controls in the issuance of certificates where a railroad, or its subsidiary, is the applicant. The Commission says the requirement is notably omitted from the terms of

[1] Formerly Sec. 213(a)(1), amended Aug. 2, 1949, 63 STAT. 485, 49 U.S.C.A. § 5(2)(b).

[2] As enacted Aug. 9, 1935, 49 STAT. 551, 49 U.S.C.A. § 307(a).

Section 207(a); that the policy, not the terms, of the requirement applies to the issuance of certificates under 207(a). It says a policy requirement is not so rigid as a flat requirement in terms but is flexible and permits a grant in exceptional circumstances where the Commission finds that the public interest, convenience and necessity require the grant.

We agree with the contention of the Commission in the foregoing respect. The case concerns the issuance of a certificate.[3] Certainly the terms of the requirement as to auxiliary and supplementary service do not appear in Section 207(a). It is equally certain that the policy of the requirement, being a basic policy in the statute, does apply. The difference between a rigid requirement and an applicable policy is one of flexibility and permits the Commission to be governed in exceptional circumstances by the needs of the public convenience and necessity.

This brings us to the second main part of the controversy. The traffic consists of intrastate traffic, rail originated traffic, and interstate "peddle" traffic. The rail originated traffic goes, through natural course of events, to Motor Transit. That service is largely auxiliary or supplementary to the train service and is not actually involved in the controversy. Certificates for the intrastate traffic are issued by the State of Iowa, and that State follows the usual rule of public utility regulation that where the business makes economically feasible only one carrier it will certificate only one. It has certificated Motor Transit for the intrastate traffic along the routes here involved, and so that traffic is not actually involved in the present controversy. The so-called interstate peddle operation is one in

[3] See Interstate Commerce Comm'n v. Parker, 326 U.S. 60, 89 L. Ed. 2051, 65 S. Ct. 1490 (1945); United States v. Rock Island Co., 340 U.S. 419, 428, 431, 442, 95 L. Ed. 391, 71 S. Ct. 382 (1951); United States v. Texas & Pac. Co., 340 U.S. 450, 95 L. Ed. 509, 71 S. Ct. 422 (1951).

which the motor carrier, starting with a full truckload, moves interstate and distributes that load at various points of destination; or, in reverse, a truck picks up parts of loads at various points of origin and eventually transports interstate a full truckload. This is really the traffic which is involved in the pending case. The Commission found, in effect, that this peddle operation, standing alone, is not a profitable one and that the trend of motor carriers operating in Iowa has been to refrain from rendering this service; that the business communities along the routes need this sort of service; and that Motor Transit, already having rail originated and intrastate traffic, can readily render this additional service. As a matter of fact Motor Transit has operated since its first acquisition in 1938 without the restrictions here in issue. During that period it satisfactorily performed this particular service. Actually the result of sustaining the motor carriers' position would be a privilege to them of giving the service now rendered by Motor Transit if they so desire and refusing to give it when it is economically not feasible. That would not appear to serve the public interest.

We think the position of the Commission is well taken on the evidence. Voluminous testimony was produced. The findings are extensive. The conclusion that the grant appears necessary in the public interest is well founded. Judgment will be rendered for the defendants.

E. Barrett Prettyman
David A. Pine
Alexander Holtzoff

Dated 1/11/56

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3171-55

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL., *Plaintiffs*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

JUDGMENT

This action to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on December 15, 1955, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties; and being fully advised in the premises; and having on January 11, 1956, filed herein its opinion holding that the order of the Interstate Commerce Commission herein assailed is valid and that judgment will be rendered for defendants; now in accordance with the said opinion,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the relief sought herein be, and the same hereby is, denied, and judgment be, and the same hereby is, rendered for the defendants, with costs assessed against the plaintiff and intervening plaintiffs.

This 27th day of January, 1956.

/s/ E. BARRETT PRETTYMAN
United States Circuit Judge

/s/ DAVID A. PINE
United States District Judge

/s/ ALEXANDER HOLTZOFF
United States District Judge

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-29130 (Sub-No. 70)

THE ROCK ISLAND MOTOR TRANSIT COMPANY
COMMON CARRIER APPLICATION

Submitted March 8, 1954 *Decided November 22, 1954*

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle in interstate or foreign commerce, of general commodities, with exceptions, between certain points in Illinois, Iowa, and Nebraska, over regular routes, serving designated intermediate and off-route points, subject to conditions. Issuance of a certificate approved, and application in all other respects denied.

A. B. Howland and *J. H. Martin* for applicant.

D. C. Nolan, Henry A. Archambo, Ernest Porter, and *R. H. Heinecamp* for interveners in support of the application.

Albert B. Rosenbaum, Rex H. Fowler, Homer E. Bradshaw, Eugene L. Cohn, Bernard G. Colby, Edgar Watkins, William B. Adams, James F. Pinkney, Joseph E. Ludden, Stephen Robinson, Walter V. Huston, and *William A. Landau* for protestant and interveners in opposition.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the order recommended by the examiner were filed by a protestant and nine motor-carrier interveners in opposition. Applicant and interveners in support of the application replied to the exceptions. The case was

orally argued before us. Our conclusions differ slightly from those recommended.

By application filed October 26, 1951, as amended, The Rock Island Motor Transit Company, hereinafter called applicant or Motor Transit, of Chicago, Ill., seeks a certificate authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except nitroglycerine, commodities of unusual value, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, (1) between Chicago, Ill., and Omaha, Nebr., from Chicago over U. S. Highway 34 to junction of Illinois Highway 92, thence over Illinois Highway 92 to junction of U. S. Highway 6, and thence over U. S. Highway 6 to Omaha, (2) between Iowa City, Iowa, and Cedar Rapids, Iowa, from Iowa City over U. S. Highway 218 to Cedar Rapids, (3) between Harlan, Iowa, and Omaha, Nebr., from Harlan over Iowa Highway 64 to Council Bluffs, Iowa, and thence over U. S. Highway 6 to Omaha, (4) between Avoca, Iowa, and Atlantic, Iowa, (*a*) from Avoca over U. S. Highway 59 to junction U. S. Highway 6, and thence over U. S. Highway 6 to Atlantic, and (*b*) from Avoca over Iowa Highway 83 to Atlantic, and (5) return in each instance over the same routes, serving the intermediate points of East Moline, Silvis, Moline, and Rock Island, Ill., and Bettendorf, Davenport, Durant, Wilton Junction, Atalissa, West Liberty, Iowa City, Coralville, Tiffin, Homestead, Marengo, Ladora, Victor, Brooklyn, Grinnell, Newton, Colfax, Altoona, Des Moines, Dexter, Stuart, Menlo, Casey, Adair, Anita, Wiota, Atlantic, Oakland, Council Bluffs, Weston, Underwood, Minden, Neola, Corley, Walnut, Marne, and Hancock, Iowa, and the off-route points of Walcott, Muscatine, Stockton, Moscow, Oxford, South Amana, Malcom, Kellogg, Mitchellville, and Shelby, Iowa. The Regular Common Carrier Conference, of the American Trucking Associations, Inc.,

and 11 motor carriers oppose the granting of the application.

Applicant is a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, hereinafter called Rock Island. It conducts motor common carrier regular-route operations in Illinois, Indiana, Iowa, Nebraska, Minnesota, Missouri, Kansas, Texas, Tennessee, Arkansas, and Oklahoma, subject in certain instances to various restrictions affecting different route segments. This proceeding primarily relates to applicant's authorized routes within the State of Iowa (except those between Cedar Rapids and Decorah, between Muscatine and Kalona, and between Wellman and West Chester) and those extending beyond to Chicago, Ill., Omaha, Nebr., Minneapolis-St. Paul, Minn., and Kansas City, Mo.

The history of the transactions and circumstances leading to the instant proceeding and the evidence adduced herein are set forth in the examiner's report in much detail. On exceptions, protestant and interveners opposing the application challenge the examiner's findings of fact and conclusions drawn therefrom; however, in no instance has specific reference been made to the page or pages of the transcript upon which they rely to refute the examiner's findings. Although we may not agree in every instance with the emphasis which the examiner has given certain of the evidence submitted in this proceeding, our review of the record indicates that basically his findings of fact are sound, and no useful purpose would be served by repeating them once again. Under these circumstances we adopt substantially the statement of issues and the evidence as reported by the examiner with such modifications and added discussion thereof as appear necessary and proper.

Prior to August 30, 1951, applicant operated over U. S. Highway 6 under a certificate, subject to the condition or reserved right of the Commission later to impose such restrictions which might be found necessary to insure, that

the service should be limited to that which is auxiliary to, or supplemental of, train service of Rock Island and shall not unduly restrain competition, and as to the remainder of the authority sought under an approved purchase without any provision for the issuance of a certificate containing such condition or reserved right. On September 11, 1951, it was issued a certificate specifying operations over the described routes, containing the following restrictions:

1. The service to be performed by The Rock Island Motor Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railway Company.

2. The Rock Island Motor Transit Company shall not render any service to, or from, or interchange traffic at any point not a station on the rail line of The Chicago, Rock Island and Pacific Railway Company.

3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Ill.

4. All contractual arrangements between The Rock Island Motor Transit Company and The Chicago, Rock Island and Pacific Railway Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

Our power to impose these restrictions pursuant to the reserved condition was affirmed by the United States Supreme Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419. However, Motor Transit in this proceeding seeks by the testimony of numerous witnesses to establish that its continued operation unencumbered by these

restrictions is necessary in the public interest. The route over U. S. Highway 6 in Iowa is the heart of Motor Transit's operations in that State, and such restrictions not only affect that route but also a number of other routes which are not similarly restricted.

Prior to the issuance of the certificate dated September 11, 1951, containing the above-described 5 conditions, applicant was issued certain temporary authorities and pursuant thereto may transport general commodities, with exceptions, over the routes described in the application, subject to a maximum weight limitation of 5,000 pounds, and further subject to the restriction that no shipment may be transported between Chicago and Omaha, nor between any of the following points, or through, or to, or from, more than one of said points: Omaha, and collectively, Davenport, Bettendorf, Rock Island, Moline, and East Moline. This presently effective temporary authority expires concurrently with the final decision in this proceeding, and applicant has been and is now operating pursuant to it, which is less restrictive in the conditions to which it is subject than those contained in applicant's certificate of September 11, 1951.

Applicant's balance sheet as of January 31, 1952, shows assets of $1,858,620, and liabilities of $1,758,620, excluding capital stock, but including $873,527 advances payable to Rock Island, $250,000 long-term bank loan, and $149,764 unappropriated surplus. As of October 26, 1951, applicant owned and operated 152 trucks, 228 tractors, 303 trailers, 4 service trucks, and 4 buses. It is fit and able, financially and otherwise, properly to conduct the proposed operation.

Prior to discussing the arguments raised on exceptions and oral argument, a brief resume of the evidence for and against the granting of the application will be helpful. The Iowa State Commerce Commission supports the application. It is the view of that body that applicant is the only carrier that, for a number of years prior to September 1951,

had been rendering an adequate and efficient service on less-than-truckload freight at the many small points on the considered routes and certain points on its authorized routes adjacent thereto, and the only carrier since that date that has been providing consistent service to the extent authorized under its temporary authorities. Because of the weight and "key point" limitations contained in the temporary authorities, the service rendered thereunder is not regarded as adequate. During the 2 years preceding the hearing in the spring of 1952, the trend of motor carriers operating in Iowa generally has been to refrain from rendering local service on small shipments. This State commission grants intrastate authority to only one motor carrier to serve points on a given route.

Chambers of commerce and other commercial organizations at Davenport, Omaha, Chicago, Des Moines, St. Joseph, Mo., Mason City, Muscatine, Ottumwa, Iowa City, Burlington, Cedar Rapids, and Atlantic, Iowa, and Minneapolis, Minn., and East Moline, Moline, and Rock Island, Ill., representing in excess of 2,300 members, ship various commodities in lots of less than 15,000 pounds and sometimes in truckloads to the destinations here involved. It is the view of their membership that rail service is too slow and that the unrestricted service proposed by applicant is essential to the proper conduct of their members' businesses as there is no other motor carrier maintaining the complete peddle service rendered by applicant prior to the imposition of the restrictions. Pool-car distribution is made from some of the described points.

Eight motor carriers have been and are interlining traffic with applicant, principally at Chicago and the Tri-Cities. Generally these carriers do not ordinarily experience any difficulty in interlining shipments destined to the larger points of population on U. S. Highway 6, such as Des Moines and Newton, but they are of the opinion that applicant must be in a position to serve these points and to handle overhead traffic in order to provide the required

service, particularly the expensive peddle operations, at the smaller points to avoid sustaining a loss on the entire operation. Several of these carriers are members of the American Trucking Associations, Inc., which is opposing the application.

Thirty-eight shippers and receivers of a large variety of commodities located at Kansas City, Mo., East Chicago and Chicago, Ill., Beatrice and Omaha, Nebr., Minneapolis, Minn., and Clinton, Muscatine, Kalona, Wellman, Columbus Junction, Washington, Pella, Prairie City, Oskaloosa, Fairfield, Brayton, Exira, Hamlin, Audubon, Lewis, Griswold, Carson, and Treynor, Iowa, points served by Motor Transit but not on routes directly involved in this proceeding support the application for a variety of reasons. Some grounds given are: (1) restoration of applicant's unrestricted authority is considered essential to eliminate inconvenience and difficulties experienced since August 30, 1951, in the conduct of their businesses, (2) applicant is providing the only regular service available and the loss thereof would be injurious, (3) the loss of this service will result in delays and will place shippers at a competitive disadvantage, (4) curtailment or abandonment of Motor Transit service would mean a tremendous loss of business, (5) other carriers' services are not regular or dependable, and (6) many years of dependence upon applicant's service, and the effect the loss of such service would have on their business activities.

There are 45 points of service on the routes of White Line Freight Company, Incorporated, and White Line Trucking Company, applicant's predecessors, hereinafter collectively called the White Line route and 11 such points on the routes of J. H. Frederickson and D. H. Frederickson, doing business as J. H. Frederickson & Son, also applicant's predecessor, hereinafter called the Frederickson Line route, in addition to certain points that are on both routes.

One hundred and one public witnesses, both consignors and consignees, hereinafter collectively called shippers, from points on the White Line route and 10 public witnesses of the same category from points on the Frederickson Line route testified in support of the application. These shippers were from every point on the White Line route, except Silvis, Bettendorf, and Moscow, and from every point on the Frederickson Line route, except Weston, Avoca, and Corley. They ship or receive a variety of commodities in less-than-truckload quantities, and some of them receive shipments in truckload lots. Their testimony relates principally to the former, which prior to August 30, 1951, was handled by applicant in peddle operations in a very satisfactory manner, and since that date in the same manner to the extent that the weight limitations in the temporary authorities issued to applicant permit. Applicant's service on truckloads also has been satisfactory, but admittedly competing motor carriers generally provide prompt service on this type of traffic. In some instances, they have refused to accept truckload shipments of low-rated commodities. In one instance, applicant was the only carrier readily available with proper equipment to transport the commodity. In general the shippers' evidence is to the effect (1) that they had, prior to August 30, 1951, very efficient and dependable peddle service by applicant, which they need in the operation of their various businesses and which to a large extent have been built upon applicant's service, (2) that peddle shipments are not accepted by many motor carriers serving the larger points, (3) that owing to competition the service of applicant is vitally essential as there are no other transportation facilities available that can replace this service, (4) that experience has demonstrated that such service is superior to that provided by other motor carriers, (5) that curtailment of applicant's service would force some shippers to purchase and operate their own equipment, (6) that a few shippers would have to pick up shipments at points from 3 to 10 miles from their places of business, (7) that the existing

weight limitation of 5,000 pounds per shipment is burdensome, (8) that imposition of the supplemental and auxiliary to rail service restriction would result in deterioration of the intrastate services rendered by applicant, (9) that certain opposing carriers' services have been unsatisfactory due to attempted night deliveries, delays, erroneous rate information, and slow payment of claims, and (10) that 11 points on the White Line route would have no motor peddle service if this application is not granted and others would have no scheduled peddle service. Generally these supporters of the application desire a return to the service rendered by Motor Transit prior to the time that the five conditions, designed to insure that its service should be auxiliary or supplemental to the train service of the parent railway, were imposed.

Ten motor carriers oppose the application. Two of them possess authority to serve all points on the White Line route, and one of these also holds authority to serve all points on the Frederickson Line route. Neither has been furnishing any substantial amount of peddle service on less-than-truckload shipments on these routes. Others of these 10 carriers render some peddle service to and from a few points principally to the immediate east of Des Moines, but the record is unconvincing that this service is adequate. Those having interstate authority on U. S. Highway 6 assert that they are anxious to provide peddle service as the traffic warrants. All believe that a grant of authority in this proceeding would be detrimental to their operations principally by depriving them of traffic that they might transport if applicant's operations are subjected to the five conditions previously discussed. These opposing carriers concede that during the approximate 14-year period in which time applicant was operating over the involved routes without restricting its service, the volume of traffic handled by each of these carriers has increased substantially and generally to a greater extent than did the volume transported by applicant.

The examiner recommended that the application be granted. On exceptions the protestant and interveners in opposition allege that the examiner erred (1) in construing the decision in *United States* v. *Rock Island Motor Transit Co.*, *supra*, (2) in stating the purpose of the application, (3) in his interpretation of our policy respecting the imposition of restrictions on operating authorities issued to motor-carrier subsidiaries of railroads, and in finding (4) that the White Line route rights had been operated for several years without complaint that such operations unduly restrained competition, (5) that applicant is the only carrier that for many years has maintained daily scheduled peddle operations over the entire White Line route and Frederickson Line route, (6) that other carriers provide such service only on small segments of these routes, (7) that opposing carriers delivered less-than-truckload freight to applicant for movement to destinations they are authorized to serve, (8) that the supporting witnesses from points in Iowa have built their businesses on applicant's service, particularly with respect to less-than-truckload shipments, (9) that such witnesses deem applicant's service very satisfactory and are not convinced that other motor carriers can or will render the same type of service, (10) that Iowa-Nebraska Transportation Co., Bos Truck Lines, and Des Moines Transportation Company, hereinafter called Iowa-Nebraska, Bos, and Des Moines Transportation, respectively, are the only motor carriers that hold appropriate authority to serve all points or a substantial number of points on the routes directly involved, (11) that there is no serious contention that Bos and Des Moines Transportation are in a position to supplant applicant's operation, (12) that Iowa-Nebraska is the carrier that the opposition advances as being in a position to take over the interstate traffic moving to and from points on the White Line and Frederickson Line routes which applicant would have to relinquish, (13) that Iowa-Nebraska inaugurated certain peddle operations for the purpose of placing the opposing

carriers in a position at the hearing to show that they are endeavoring to provide service, (14) that Iowa-Nebraska does not contemplate inaugurating daily scheduled peddle operations to take the place of each such operation conducted by applicant, (15) that opposing motor carriers did not present one public witness to testify as to adequacy of their service, (16) that applicant has in general, throughout the years, worked for the development and betterment of the motor-carrier industry, (17) that the reluctance of shippers to ship under rail billing is due to the fact that the shipments require longer time in transit, (18) that the operations of applicant have not unduly restrained competition, (19) that the nonparticipation of the railroad in motor-carrier tariffs is due to the policy of the motor carriers refusing to establish joint rates, (20) that the evidence abundantly establishes that public necessity and convenience requires the proposed less-than-truckload peddle operations, (21) that not one of the opposing carriers having the requisite authority has established or offered to establish scheduled peddle operations to replace the type of service rendered by applicant, (22) that with three kinds of traffic available to applicant it could provide better service than those carriers who claim they can take over applicant's interstate motor-billed freight, (23) that the opposing motor carriers cannot obtain intrastate rights, (24) that there is evidence that opposing motor carriers have refused to accept truckloads of low-rated commodities, (25) that the truckload traffic which is "the cream of the traffic" has been handled by applicant for many years without seriously affecting the expansion of its competitors, (26) that opposing motor carriers would be under a public duty to provide the peddle service on interstate motor-billed freight, which traffic alone will not justify the type of service heretofore rendered by applicant, (27) that applicant would still be tendered intrastate-and-rail-billed traffic, which would not warrant continuance of the operations conducted by it prior to August 30, 1951, (28) that

the net result would be injury to the public, (29) that a substantial number of employees of applicant would be dismissed, (30) that the conclusions reached in his report are not an abrogation of the policy established in *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M.C.C. 221, 240, decided November 12, 1938, and in concluding (31) that the application should be granted in its entirety.

As noted, protestants and interveners challenge practically every material statement of fact and conclusion reached therefrom, in the report of the examiner. Briefly their position is that the evidence does not establish a public need for the proposed service of applicant other than a supplementary or auxiliary service to the rail service of the Rock Island, and that several of them are able, ready, and willing to provide all the types of service that Motor Transit would have to discontinue under the restrictions we have imposed on applicant's permanent authority. In addition they allege that we have no jurisdiction to grant applicant a certificate without restrictions. This will be discussed later herein.

In general protestant and interveners argue that the grant recommended by the examiner would give applicant an advantage over them by reason of its affiliation with the Rock Island through (1) financial assistance, if necessary, (2) the transportation of rail-billed freight under a contractual agreement with Rock Island, (3) the movement of traffic in merchandise cars and by truck between the same points, (4) the possibility that applicant might solicit traffic to be moved between identical points at either the rail or motor-carrier rates, (5) the ignoring by Rock Island and applicant of tariff provisions regarding packing and loading, (6) the use by applicant of dock and terminal facilities leased from Rock Island, and (7) the removal of the key-point restriction, which would permit eastbound rail-billed traffic to move by truck.

Rock Island has rendered applicant financial assistance, traffic has been moving and would continue to move as indicated in (3) and (7) above, but there is no substantial evidence that these things have during the past several years materially affected the operatinos of the opposing motor carriers. From the past history of Motor Transit's operations there is little reason to believe that future operations would be conducted in any radically different manner from those in the past. The contention in (4) above is a possibility but applicant has not done so in the past. No explanation of (5) above is advanced, but carriers may not legally disregard tariff provisions. Applicant has and would enter into contractual agreements as indicated in (2) and (6) above with Rock Island. The record is vague regarding the terms of such agreements and Rock Island through these agreements could secure transportation of its freight at less than reasonable charges for the service rendered and lease to applicant dock and terminal facilities at rents in excess of their actual value. Therefore, we are of the opinion that any grant of authority herein should be subject to a condition that all contractual agreements between applicant and Rock Island should be reported to us and should be subject to revision if and as we find it to be necessary in order that such agreements shall be fair to the parties and to the public.

The contentions advanced by protestant and interveners on oral argument with respect to the facts are for all practical purposes the same as those set forth in their exceptions. In both their exceptions and on oral argument they insist that we are without statutory authority to grant applicant the type of certificate here sought. They arrive at this conclusion from our policy since the enactment of the Motor Carrier Act, 1935, of generally imposing restrictions on certificates granted to motor carrier subsidiaries of railroads, which restrictions usually have provided, among other things, that the service of the motor carrier shall be supplemental of, or auxiliary to, the service of the railroad.

Such restrictions were first imposed in *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M.C.C. 101 and 5 M.C.C. 9 and 49, and *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M.C.C. 221, and 28 M.C.C. 5. Opposing carriers concede that section 207 of the Interstate Commerce Act, hereinafter called the act, the section under which this application was filed, does not contain any provisions requiring imposition of restrictions on certificates issued to motor-carrier subsidiaries of railroads, but nevertheless argue that the national transportation policy, congressional intent, and the provisions of section 5(2)(b) of the act governing "Combinations and consolidations of carriers" (formerly section 213 of the Motor Carrier Act, 1935), require that the various forms of transportation be kept distinct so that each can operate in its own sphere independently of the other. It is claimed that these considerations mean that we do not have statutory authority to grant applicant an unrestricted certificate. We do not subscribe to this view. Our statutory authority to impose terms and conditions on a grant of authority under section 207 is derived from section 208 of the act. We have always construed these two sections in the light of the national transportation policy to require, where the circumstances warranted, the imposition of restrictions on certificates issued to motor-carrier subsidiaries of railroads. Where the circumstances did not require such action, we have issued certificates subject to a reservation to impose in the future any limitations, restrictions, or modifications that may appear necessary, and in some instances certificates have been issued without restrictions or even a reservation as just described. These two types of certificates, if protestant's and interveners' theory is sound, would be null and void, because, according to them, we possess no statutory authority to issue certificates to carriers such as applicant unless they are limited to services that are supplemental to, or auxiliary of, the service of a railroad. All certificates of this character have been issued strictly in accordance with the applicable statute.

Protestant and interveners also contend that the decision of the United States Supreme Court in *United States* v. *Rock Island Motor Transit Co., supra*, supports their position that we are without jurisdiction to grant the kind of certificate sought. We find nothing in that decision that warrants such a conclusion. Therein the Court affirmed our power to impose the restrictions hereinbefore quoted. It did not directly or by reasonable implication say that we have no statutory power to issue certificates of the character here considered without restrictions. In our opinion the decision does not require any change in the interpretation heretofore placed on the statute and the national transportation policy. In other words we may issue certificates to motor-carrier affiliates of railroads with or without restrictions as the circumstances may require.

A review of the development of our policy of granting motor-carrier operating authorities to rail affiliates and the applicability of these precedents to this application is set forth in the examiner's report, but is worthy of repetition.

The Motor Carrier Act, 1935, was approved August 12, 1935, and therein Congress declared its policy to be as follows:

to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, * * * improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; * * *.

The declaration of policy of Congress in the Transportation Act of 1940, approved September 18, 1940, is worded somewhat differently, but its import is substantially the same as that contained in the foregoing quotation.

Section 213(a)(1) of the Motor Carrier Act permitted a railroad to acquire a motor carrier, provided we find that the acquisition will promote the public interest by enabling the railroad to "use service by motor vehicle to public advantage in its operations," without undue restraint of competition. This section was repealed by the Transportation Act of 1940. The substance thereof was carried into section 5 of the act.

Early in the regulation of the motor-carrier industry, division 5, in *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt., supra,* said:

> we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, * * *, is evidence that Congress was not convinced that this should be done.

These views ripened into a policy in *Kansas City S. Transport Co., Inc., Com. Car. Application, supra,* which was prior to the acquisition by Motor Transit of the White Line and Frederickson Line rights. Therein division 5 imposed 5 conditions or restrictions upon the operating authority granted to a motor-carrier subsidiary of 2 affiliated railways, which in most respects were substantially the same as the conditions and restrictions ultimately imposed and contained in the certificate issued to Motor Transit on September 11, 1951. After that decision, practically all grants of operating authority to motor-carrier subsidiaries of railroads were made subject to like conditions and restrictions or modifications thereof required by the particular circumstances, except in a few instances, such as that here under consideration insofar as the White Line rights are concerned, the certificates contained no provisions limiting the service to that which is auxiliary to, or supplemental of, train service. The approval of the purchase of the White Line rights and the original certificate

covering these rights, as before indicated, were specifically made subject to the condition or reserved right later to impose such restrictions which we might find necessary to insure that the service would be limited to that which is auxiliary to, or supplemental of, train service of the Rock Island.

The main purpose for the policy of imposing the five above-quoted restrictions, or modifications thereof, was to prevent the railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. This policy was and is sound and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience.

Motor Transit operated the White Line rights in Iowa under claimed "grandfather" rights from April, 1938, to December 31, 1941, and under a certificate from the latter date to February 5, 1945, that contained only the reserved right to impose in the future such conditions that may be necessary to insure that the service shall be auxiliary to, or supplemental of, train service. From February 5, 1945, to the present, Motor Transit has continued the operation by reason of pending proceedings before us or litigation before the courts, or under temporary authority originally issued August 30, 1951, later modified, and subsequently extended to the date of the disposition of this proceeding. Although our policy of imposing the quoted restrictions was established about 3 years prior to the issuance of a certificate to Motor Transit, the certificate of that carrier did not restrict the operation of the White Line rights in any manner. Thus, Motor Transit operated under such

rights for a period of about 7 years without any complaint that its operation was unduly restraining competition or indication that we contemplated exercising the said reserved rights. After we, on our own motion, reopened No. MC-29130 and the 2 related cases for reconsideration, and imposed the above-described 5 restrictions and conditions, the proceedings were reopened for further hearing upon petition of Motor Transit for reconsideration, oral argument, and withdrawal of the report on reconsideration. The attorneys representing Motor Transit at that time did not recognize our jurisdiction to change or modify the orders authorizing the acquisition of Motor Transit's certificates, and they entered a special appearance on applicant's behalf solely for the purpose of filing the petition. At the subsequent further hearing a like appearance was entered for the sole purpose of contesting our jurisdiction. Consequently there was no new or additional evidence before us and, as a result thereof, the only issue was the question whether the reasoning of the prior report on reconsideration and the conclusions reached therein were sound in the face of the criticisms thereof contained in Motor Transit's petition. In the circumstances we had no alternative but to impose the restrictions and conditions established in accordance with the policy enunciated in *Kansas City S. Transport Co., Inc., Com. Car. Application, supra.* This action was considered by the United States District Court for the Northern District of Illinois in a suit initiated by Motor Transit. That court set aside and permanently enjoined enforcement of our order. This decision sustained Motor Transit's position. On appeal, however, the United States Supreme Court reversed the decision of the district court and thereby sustained our views. Thereafter, Motor Transit requested limited temporary authority and filed this application under section 207 of the act for permanent authority. Thus, after the passage of approximately 4 years, Motor Transit concluded to do substantially what it had an opportunity to do in October 1947, namely to introduce additional evidence in the reopened proceedings.

Applicant is the only carrier that for a considerable number of years has maintained daily (generally at least 5 days a week) scheduled peddle operations over the entire White Line and Frederickson Line routes regardless of the volume of traffic available for movement in such operations. Opposing motor carriers with appropriate authority have not provided such a service, except with respect to selected small segments of the routes, principally immediately east of Des Moines. These carriers prior to August 30, 1951, delivered less-than-truckload freight to Motor Transit for movement to destinations they are authorized to serve. Some of this freight consisted of low-rated articles which such carriers deemed unprofitable to handle. These carriers in many instances refused to accept less-than-truckload shipments from their motor-carrier connections, for movement to a destination embraced in their operating authority. As a result thereof, several of these connecting carriers have had to rely upon Motor Transit to accept and make delivery of such shipments, even in cases where the delivering carrier was designated by the shipper. These experiences have convinced some of the connecting carriers that the unrestricted services of Motor Transit should continue to be available to them so that they may have a carrier that is always willing and able to accept interchange shipments destined to points on the White Line and Frederickson Line routes. One motor carrier that possesses rights on U. S. Highway 6 between Davenport and Des Moines, elects to give all of its less-than-truckload freight to Motor Transit for delivery at such points, because it is not profitable for it to provide this service.

Applicant adduced testimony of a great number of public witnesses from practically every point served by Motor Transit on the routes directly involved here and also some located at certain points on its other routes that would be affected by the restrictions and conditions imposed September 11, 1951. The witnesses located at points in Iowa have used the services of Motor Transit over a period of

many years and have, to a considerable extent, built their businesses on that service, particularly with respect to less-than truckload shipments. With that service available, they do not have to maintain large inventories because they can order from the manufacturer or wholesaler at the supply points, such as Chicago, Minneapolis-St. Paul, Omaha, Kansas City, or Moline, early one day and be reasonably certain of delivery on the next day in some instances, and in others not later than the second day. Some of them stressed their need for this service in obtaining expedited movement of repair parts, including those for farm machinery. In general, all of these witnesses, both those directly and indirectly affected, are apprehensive that, if we ultimately require Motor Transit to confine its operations to the transportation of rail-billed freight, their businesses will be adversely affected; as indeed some of them already have been, by the weight limitations imposed in the temporary authorities. Some of the witnesses have not been able to obtain reasonably prompt pickup and delivery of shipments by carriers other than Motor Transit. A few of them could get along without the service of Motor Transit, but they would use it in preference to the service of any other authorized carrier. The great majority of these witnesses support this application because they have received satisfactory service from Motor Transit for a long time, and they are not convinced that any other motor carrier will or can render the type of complete service respecting transportation, claim adjustments, rate and routing information, and tracing of shipments to which they are accustomed. Motor Transit is able to provide such complete service because it maintains freight agents at many points on its routes and the other motor carriers have them located at some of the larger points only.

Of the opposing motor carriers, Iowa-Nebraska, Bos, and Des Moines Transportation are the only ones with interstate authority to serve all points or a substantial number of designated points on the routes directly involved in this

proceeding. Bos has the authority to provide peddle service at all points on U. S. Highway 6 in Iowa. It has been providing such service approximately three times a week from Des Moines to Grinnell and return; and from Des Moines to Anita and return. A few other points on the White Line route are served by over-the-road equipment, through cartage companies, or on a call-and-demand basis. These services are not comparable to the peddle services rendered by Motor Transit. Des Moines Transportation possesses interstate authority to serve only 10 intermediate points on U. S. Highway 6 between the Mississippi River and Omaha. Daily peddle service is provided at 6 of the 10 points. These 6 points are located east of Des Moines. This carrier's authority is insufficient to allow it to replace the interstate service heretofore rendered or presently being rendered by Motor Transit. Recognizing this it says that if necessary it will seek additional authority. Certain other opposing carriers hold authority to serve a few of the points on the routes directly or indirectly involved. There is no serious contention that either Bos or Des Moines Transportation is in a position to supplant Motor Transit operations as rendered prior to August 30, 1951

Iowa-Nebraska is the carrier that the opposition advances as being in a position to take over the interstate traffic moving to and from points on the White Line and Frederickson Lines routes, which Motor Transit would have to relinquish under the conditions and restrictions imposed September 11, 1951. This carrier possesses the required interstate authority to render such service, but over the years it has not been providing any substantial peddle service on these routes. This, no doubt, was attributable to the small amount of this kind of traffic available to this carrier and to some extent probably by the fact that a large part of its business is the transportation of dairy products eastbound to Chicago, Philadelphia, New York City, and Boston. In February 1952, it inaugurated certain peddle operations, and together with the other opposing

line-haul motor carriers and certain other motor carriers discontinued, after August 30, 1951, the transfer of less-than-truckload traffic to Motor Transit for delivery to points on its lines also served by one or more of the opposing carriers. Iowa-Nebraska does not contemplate inaugurating daily scheduled peddle operations to take the place of each such operation conducted by Motor Transit, but says that it will provide this type of service as demanded by the volume of traffic. This clearly is not the kind of service that the supporting witnesses have had available in the past, and their testimony demonstrates that they will not be satisfied with less in the future.

Applicant's operations have been conducted in the same manner as other motor carriers operating in the same area. It has participated in the conferences of such carriers and is a party to their agency tariffs, and in general throughout the years has worked for the development and betterment of the industry as a whole without regard to its being a subsidiary of a railroad. The less-than-carload traffic moving by railroad over a recent 5-year period has consistently declined. During a comparable period the volume of traffic handled by a group of nine motor carriers serving the Midwest area increased substantially. Applicant's tonnage also increased, but not to the extent of its competitors represented by this group of carriers. Thus the operations of applicant have not unduly restrained competition, and there is no evidence that its proposed operations would produce such a result.

The opposing motor carriers take the position that Motor Transit's operations should be restricted, in accordance with our general policy in this type of proceeding, to the transportation of rail-billed freight only. They indirectly imply that Motor Transit could handle freight on this type of billing just as expeditiously as that moving on motor-carrier billing. Theoretically this should be true, but in actual practice the motor-billed freight is handled with greater dispatch; and this is the reason that many of the

public witnesses supporting applicant have refused to deliver their shipments to Rock Island for billing even though the line-haul transportation thereof is performed entirely by Motor Transit. The reluctance of shippers to use this kind of service is clearly due to the fact that it requires longer time in transit. For example, a shipment moving on rail billing from the Twin Cities to Marengo is picked up by the cartage company employed for that purpose by Rock Island and delivered to the Minneapolis or St. Paul rail terminal, worked, billed, and, in 1 or 2 days, turned over to Motor Transit for movement to destination. This shipment would require from 2 to 4 days more in transit than would be necessary if it moved by Motor Transit on motor billing. The situation in the reverse direction would be substantially similar. Motor-billed shipments from Chicago are picked up by Motor Transit and moved out in road-haul equipment the same night, as contrasted with rail-billed shipments which are picked up by a cartage company for Rock Island and moved to Burr Oak, 15 miles, worked, billed, and returned to Chicago for transfer to Motor Transit for transportation to destination, or if it is necessary to move these shipments west from Burr Oak in boxcars owing to the key-point restriction they would not reach Davenport for 2 or 3 days and sometimes longer. Similar delays occur on shipments in boxcars to Des Moines. The delays in handling rail-billed shipments from Chicago are greater than from the Twin Cities. Rail-billed freight is delayed at points in Iowa on account of the method of handling these shipments before they are transferred to Motor Transit for movement. Perhaps these delays are unavoidable, but it seems that some course of action might be undertaken by Rock Island to eliminate or reduce the time of rail-billed shipments in transit.

The evidence abundantly establishes that public convenience and necessity require the proposed less-than-truckload peddle operations. In addition to the testimony of the many public witnesses regarding their need for such serv-

ice, there must be taken into consideration that not one of the opposing motor carriers having the requisite authority has established or offered to establish scheduled peddle operations to replace each such operation conducted by Motor Transit prior to August 30, 1951, and, by refraining from doing so, they no doubt realize that such peddle operations could not be profitably operated with interstate traffic only. The peddle service provided by Motor Transit has been, and to a limited extent, due to the weight limitation, is, based on interstate, intrastate, and rail-billed traffic. With these three kinds of traffic available it is patent that Moter Transit could provide better service to the public than the motor carriers who claim that they can take over Motor Transit's interstate motor-billed business. These carriers hold no intrastate rights on the considered White Line and Frederickson Line routes and cannot obtain such rights because it is the policy of the Iowa State Commerce Commission to grant such rights to only one carrier on a given route. Motor Transit possesses such rights on these routes.

There is some evidence of a public need for the proposed truckload services of applicant, but it is not as convincing as that with respect to the peddle operations, and this is understandable because the other motor carriers operating in the area have usually provided satisfactory service on truckload shipments. There is also some evidence that the latter have refused to accept truckloads of low rated commodities. In any event we feel that there is sufficient basis to warrant a complete grant of authority to applicant. This truckload "cream of the traffic," which to some extent has been handled by Motor Transit for many years without seriously affecting the expansion of its competitors' operations, should not be handed over to its competitors and Motor Transit expected to provide the expensive peddle services.

Acceptance of the opposing motor carriers' position would have the following results. They would be left to

provide the peddle services on interstate motor-billed traffic, which alone will not justify the type of services heretofore rendered by Motor Transit, and all such traffic in truckloads. Motor Transit would be left with intrastate and rail-billed traffic, which will not warrant continuance of the operations conducted by it prior to August 30, 1951. The net result is clearly not in the public interest.

Applicant seeks unrestricted authority and we are satisfied that the grant of authority hereinafter made should be free of restrictions, except the one previously discussed and, in addition, one whereby we shall retain jurisdiction to impose in the future whatever restrictions or conditions, if any, appear necessary in the public interest by reason of material changes in conditions or circumstances surrounding applicant's operations in relation to those of competing motor carriers. Accordingly such a restriction will be imposed.

The application requests, among other things, authority over designated highways between Chicago and Omaha. Applicant presently holds authority between Chicago and Silvis. Consequently, there is no reason for including this segment in the findings herein. The findings will include only the segment of this route between Silvis and Omaha, which authority may be tacked with the present authority between Chicago and Silvis.

The commodity description used in the findings herein authorize the transportation of dangerous explosives, except nitroglycerin. This description it its entirety is the same as that contained in the certificate issued on September 11, 1951.

The authority herein set forth in our findings supersedes and cancels all authority heretofore granted between the same points, more particularly described on "Sheets 2 and 15" of the certificate issued to applicant on September 11, 1951.

The findings hereinafter made are not to be construed as an abrogation of the policy established in *Kansas City S. Transport Co., Inc., Com. Car. Application, supra.* They represent an exception to that policy justified by the evidence in this proceeding. In other words, such findings do not establish a precedent. Each case of this character must be determined upon the facts and circumstances disclosed by the evidence.

FINDINGS

We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, nitroglycerin, household goods as defined in *Practices of Motor Common Carriers of Household Goods, supra*, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, (1) from Silvis, Ill., to Omaha, Nebr., over Illinois Highway 92 to its junction with U. S. Highway 6, and thence over U. S. Highway 6 to Omaha, and return over same route, serving the intermediate points of East Moline, Moline, and Rock Island, Ill., and Bettendorf, Davenport, Durant, Wilton Junction, Atalissa, West Liberty, Iowa City, Coralville, Tiffin, Homestead, Marengo, Ladora, Victor, Brooklyn, Grinnell, Newton, Colfax, Altoona, De Moines, Dexter, Stuart, Menlo, Casey, Adair, Anita, Wiota, Atlantic, Oakland, and Council Bluffs, Iowa, and the off-route points of Walcott, Muscatine, Stockton, Moscow, Oxford, South Amana, Malcom, Kellogg, Lewis, and Mitchellville, Iowa, (2) from Iowa City, Iowa, to Cedar Rapids, Iowa, over U. S. Highway 218 and return over same route, serving no intermediate points, (3) from Harlan, Iowa, to Omaha, Nebr., over Iowa Highway 64 to Council Bluffs, and thence over U. S. Highway 6 to Omaha, and return over same route, serving the intermediate points of Corley, Minden, Neola, Underwood, and Weston, Iowa, and the off-route

point of Shelby, Iowa, and (4) from Avoca, Iowa, to Atlantic, Iowa, (*a*) over U. S. Highway 59 to Oakland, and thence over U. S. Highway 6 to Atlantic, and (*b*) over Iowa Highway 83 to Atlantic, and return over either route, serving the intermediate points of Hancock, Walnut, and Marne, Iowa, subject to the conditions (1) that there may be attached from time to time to the privileges granted herein such reasonable terms, conditions, and limitations as the public convenience and necessity may require, and (2) that all contractual arrangements between The Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railroad Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and with our rules and regulations thereunder, an appropriate certificate will be issued.

An appropriate order will be entered.

COMMISSIONER FREAS concurs in the result.

ALLDREDGE *Commissioner*, dissenting:

The majority decision authorizes a railroad subsidiary to enter the motor-carrier field for the purpose of rendering a straight, unrestricted service in the transportation of freight over extensive highway routes, although power is reserved to the Commission to attach to the privileges granted such reasonable terms, conditions, and limitations as the public convenience and necessity may require in the future. The decision so far as its immediate effect is con-

cerned, will thus permit the railroad in question to perform a motortruck service which is not merely complementary to, or supplemental of, its railroad operations, but which is, in many instances at least, directly competitive therewith. The authorized service will be competitive also with independent motor-carrier operations.

It is true, according to the record, that applicant may, and probably will, for time, be in position to render a superior motor-carrier service to that afforded numerous shippers by the regular motor carriers. The deep concern of these shippers for an efficient and reliable transportation service is understandable; but other important considerations must be resolved before an application of this kind may lawfully be granted.

In determining questions of public interest in such proceedings as this the Commission must be guided by the standards prescribed by Congress. Although the majority report apparently rests its ultimate conclusions upon sections 207 and 208 of the Interstate Commerce Act, other provisions of statutory law, including the specially enacted national transportation policy, are involved and should have decisive influence in determining the issues. One of these provisions is section 5(2)(b) of the act. That subsection states, in effect, that where a carrier by railroad, or any person controlled by such a carrier, or affiliated therewith, is an applicant in any proposed transaction involving certain intercarrier relations (which unquestionably includes the transaction here before the Commission) the Commission shall not enter an order of approval "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage *in its operations* and will not unduly restrain competition." [Italics supplied.] The Supreme Court, in the *Rock Island* case cited in the majority report, construed this provision of law along with others and then reviewed the practice of the Commission in restricting certificates

issued to railroads or their subsidiaries to conduct motor-truck service so as to keep such service auxiliary or supplemental to railroad operations.

The Court pointed out, at pages 443 and 444 of its opinion, that such restrictions as the Commission had been imposing "hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all or as much of motor transportation as the roads may desire." After thus stating the necessary effect of the Commission's customary restrictions, the Court said, "The announced transportation policy of Congress did not permit such development." This means, of course, that Congress has not established a policy of free and unlimited employment of motor carriers by railroads; that restrictions are necessary in order to confine each transport agency to a sphere where it may have an opportunity to develop its own inherent advantages to the fullest possible extent. This established policy of Congress was also discussed, explained, and elucidated by the Supreme Court in another important decision preceding the one in the *Rock Island* case, namely *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

The majority seems to pay some homage to this policy by declaring it to be sound and subject to relaxation "only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience." Congress, however, has not provided for any exclusions from its declared policy. That is a prerogative of Congress itself. The Supreme Court did point out in the *Rock Island* case that restrictions might well vary from time to

time; but there is no indication that Congress intended to confer power upon the Commission to issue *carte blanche* authority to a railroad to perform unrestricted motor-carrier service, subject, as here stated, only to such terms, conditions, and limitations as the public convenience and necessity may require in the future. The phrase "public convenience and necessity," in the context in which it is used in the act, does not comprehend the full public interest in transportation envisaged by congressional policy.

There may be a good reason for this policy which goes beyond the protection of different modes of transportation. It may be needed to protect the railroads against themselves. Without restraining influences in the law, it would not be too difficult, for instance, for one railroad, through the purchase of an independent motor-carrier operation, to invade the territory of another railroad without complying with the public-convenience-and-necessity provisions of part I of the act. *Cf. Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266.

I cannot agree that a proper balance between the contending interests in the light of congressional policy has been reached by the majority in this proceeding. Some of the restrictions presently contained in applicant's certificates and temporary authorities could well be modified, such as the elimination of certain, but not all, key points and the removal of the quantity restriction on motortruck shipments; but this record does not call for such drastic changes in operating authorities as the majority has approved. Unquestionably, the shippers in this area are entitled to adequate and efficient transportation service. To the extent that such a relaxation of the present restrictions in applicant's operating authorities as I have suggested does not accomplish this objective, then the independent motor carriers should be required to see that the necessary service is furnished. The existing law seems to be adequate for that purpose.

ARPAIA, *Commissioner*, dissenting in part:

In considering the legal and policy questions involved in this application by a railroad affiliate for unrestricted motor-carrier authority, the majority seems to have lost sight of the more elementary question concerning the adequacy of proof of public convenience and necessity. Apparently the majority has been overwhelmed by the quantity of the evidence in this proceeding. In previous cases, we have not allowed ourselves to be persuaded by the number of witnesses or by general statements, but rather have been motivated by the quality of the evidence. See, for example *Hancock-Trucking, Inc., Ext—Gulf and West Coast Routes*, 62 M.C.C. 513, and *T. S. C. Motor Freight Lines Extension—New York*, 62 M.C.C. 499.

A careful analysis of the record is convincing that applicant has failed to prove that public convenience and necessity require its proposed service at any of the routes and points except those on U. S. Highway 6 (the White Line route). Indeed, there is considerable doubt in my mind that applicant has met its burden of proof of need for service along that segment which runs from Iowa City to Cedar Rapids. The only justification for a grant of authority to serve that portion is as a necessary adjunct to the remainder of the White Line route.

With respect to the other authority sought by applicant, the proof does not meet the standard which we have applied heretofore, and I see no reason for deviating from our established requirements.

The majority has concluded that a condition reserving our power to impose restrictions at a later date is necessary. Because of the language used on page 108 of the report in describing the need for reserving that power, I have some doubt as to the efficacy of the condition prescribed. It should be clear and unequivocal. I feel that condition (1) in the findings is neutralized by the language in the discussion insofar as it adds any qualifications to

those set forth in section 208 of the act. To be more specific, the words in the discussion after "public interest," to wit: "by reason of material changes in conditions or circumstances surrounding applicant's operations in relation to those of competing motor carriers," are not only too general and unnecesary, but, to my mind, could be construed to limit our power to attach such subsequent limitations as may be found necessary in the public interest.

APPENDIX D

Corrected Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of July; A. D. 1955

No. MC-29130 (Sub-No. 70)

The Rock Island Motor Transit Company—Common Carrier Application
(Des Moines, Iowa)

No. MC-29130 (Sub-No. 2)

Rock Island Motor Transit Company Extension of Operations—Silvis—Chicago, Ill.

Upon consideration of the records in the above-entitled proceedings, and of:

(1) Petition to Railway Labor Executives' Association, for leave to intervene and for reconsideration, dated February 16, 1955;

(2) Petition of protestant motor carriers, American Trucking Associations, Inc., and the Regular Common Carrier Conference thereof, for reconsideration of the report of the Commission herein, dated February 16, 1955;

(3) Reply (resistance) of applicant and interveners in (2) above;

(4) Petition of applicant and certain interveners for interpretation of present certificate in No. MC-29130 (Sub-No. 2), or in the alternative, for modification of the report of the Commission in the title proceeding, dated May 16, 1955;

(5) Reply of protestant motor carriers, American Trucking Associations, Inc., and the Regular Common Carrier Conference thereof, to (4) above, dated May 26, 1955;

(6) Reply of Railway Labor Executives' Association; to (4) above, dated May 26, 1955;

and good cause appearing therefor:

It Is Ordered, That the Railway Labor Executives' Association be, and it is hereby, permitted to intervene in said proceedings with the right to appear and participate in all further proceedings therein, and that its petition in all other respects be, and it is hereby, denied, for the reason set forth in the next succeeding paragraph;

It Is Further Ordered, That the petition in (2) above be, and it is hereby, denied, for the reason that the evidence adequately justifies the conclusions and findings in the report and order of November 22, 1954;

It Is Further Ordered, That the petition in (4) above be, and it is hereby, denied, for the reason that the relief sought is not waranted.

By the Commission.

(Seal)

Harold D. McCoy,
Secretary.

APPENDIX D

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C. on the 9th day of September, A. D., 1955.

No. MC-29130 (Sub-No. 70)

The Rock Island Motor Transit Company Common Carrier Application
(Chicago, Ill.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of the Brotherhood of Railroad Trainmen, dated June 30, 1955, for leave to intervene;

(2) Petition of the Brotherhood of Railroad Trainmen, dated June 30, 1955, for reconsideration;

(3) Request of applicant for waiver of Rule 23 and reply to both petitions, filed July 22, 1955;

(4) Petition of the Order of Railway Conductors and Brakemen of America, dated August 17, 1955, for leave to intervene;

and good cause appearing therefor:

It Is Ordered, That said petitioners, the Brotherhood of Railroad Trainmen and the Order of Railway Conductors and Brakemen of America, be, and they are hereby, permitted to intervene in said proceeding with the right to appear and participate in all further proceedings herein;

It Is Further Ordered, That said late-tendered reply of applicant be, and it is hereby, filed;

It Is Further Ordered, That said petition for reconsideration in (2) above be, and it is hereby, denied, for the reason that other petitions seeking like relief were denied on July 6, 1955.

By the Commission.

(Seal)

Harold D. McCoy,
Secretary.

APPENDIX D

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C. on the 22nd day of November, A. D., 1954.

No. MC-29130 (Sub. No. 70)

The Rock Island Motor Transit Company Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It Is Ordered, That said application, except to the extent granted in said report, be, and is hereby, denied.

By the Commission.

(Seal) George W. Laird,
Secretary.

Certificate of Service

I hereby certifiy that I have today served the foregoing jurisdictional statement of the Railway Labor Executives' Association, et al., upon each of the parties and upon the Solicitor General of the United States pursuant to the requirements of Rule 33, by depositing copies of the same in envelopes in a United States Post Office with first-class prepaid, (air mail postage for parties outside of the District of Columbia), addressed to the Solicitor General and to each of the following counsel of record for such parties:

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May 24, 1956